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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JENNIFER J. HASSO-NAJM,

Cross-complainant and Respondent.

v.

DONNA FERREY,

Cross-defendant and Appellant.

D051674

(Super. Ct. No. GIN043020)

APPEAL from a judgment of the Superior Court of San Diego County, Michael M. Anello, Judge. Affirmed.

Donna Ferry appeals from a judgment against her on a cross-complaint filed by her former attorney, Jennifer J. Hasso-Najm. Ferrey contends that the jury's verdict and resulting award of \$10,000 on a cause of action for intentional concealment must be reversed because there is not sufficient evidence that Hasso-Najm's reliance on Ferrey's fraudulent representations (and omissions) was justifiable. As discussed below, we conclude that the record adequately supports the jury's verdict. Consequently, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

In 2000, Ferrey's former husband initiated marital dissolution proceedings against her. In the process of litigating the still-pending dissolution action, Ferrey has been represented by 11 different attorneys. The seventh attorney, Roy Doppelt, filed a motion to be relieved as counsel on October 22, 2003, citing "irreconcilable differences" with Ferrey as the basis for the request.

Later that month, Ferrey set up a meeting in Hasso-Najm's office to explore the possibility of retaining Hasso-Najm; she explained to Hasso-Najm that she was dissatisfied with Doppelt's efforts because he had "basically abandoned her case." The case had a trial date of December 4 and Ferrey expressed her concern that "she would lose everything" if she did not have an attorney who would vigorously represent her at the trial. Ferrey mentioned that she was interviewing "a number of other attorneys." Hasso-Najm recalled asking Ferrey "[h]ow many prior attorneys" she had on the case, which was one of the questions Hasso-Najm asked every client in order to "determine in my own mind . . . is this an appropriate case for me to take on." Ferrey represented that there had only been two other attorneys on the case.

Ferrey later contacted Hasso-Najm, requesting a copy of her standard retainer agreement and asking "a number of questions" to obtain Hasso-Najm's thoughts "regarding different aspects of her case." This was one of a "number of conversations or meetings" that Hasso-Najm had with Ferrey prior to being retained. When Ferrey later requested a second copy of the retainer agreement (she claimed not to have received the initial copy), Hasso-Najm mailed it to her with a cover letter seeking payment for the

"very significant time" she had already spent on the case. At Hasso-Najm's request, Ferrey also had Doppelt fax Hasso-Najm the trial brief, which Hasso-Najm reviewed.

Ferrey visited Hasso-Najm's office on November 14 with a copy of the retainer agreement, significantly modified with "comments all over the document." Hasso-Najm refused to enter into the attorney-client agreement on the altered terms; Ferrey then agreed to retain Hasso-Najm under the terms of her standard retainer agreement. Ferrey did not tell Hasso-Najm that there was any conflict between her and Doppelt or that Doppelt had filed a motion to be relieved as attorney of record.

On the date of trial, Hasso-Najm was unable to go forward due to illness; she was "feverish that morning" and "blacked out." Trial was continued to March 11, 2004. Between January 2004 and March 2004, Ferrey attempted to contact Hasso-Najm with extreme regularity, regularly filling Ferrey's voice mailbox so that Ferrey could not receive other client messages. Hasso-Najm's assistant viewed the regularity and nature of the contacts as so oppressive that when Ferrey would come to the office, the assistant would hide in the back until she was gone. As a result of Ferrey's conduct, Hasso-Najm installed a security system in her office.

In February, Ferrey obtained Hasso-Najm's unlisted home phone number and regularly contacted Hasso-Najm at home late at night and in the early morning hours. Some of the calls were "completely unintelligible," others consisted of Ferrey's "just screaming, ranting and raving at [Hasso-Najm]."

The dissolution trial was held as scheduled in March, with Hasso-Najm representing Ferrey at trial. After trial Ferrey retained new counsel and refused to pay

Hasso-Najm's bills. Hasso-Najm sent Ferrey a notice seeking to arbitrate their fee dispute; Ferrey did not respond.

In March 2005, Ferrey filed a malpractice action in superior court against Hasso-Najm. Hasso-Najm responded with a cross-complaint that included claims for breach of contract, concealment and invasion of privacy. The trial court dismissed Ferrey's malpractice complaint on summary judgment. The court then presided over a jury trial on Hasso-Najm's cross-complaint. At the conclusion of the trial, the jury found Ferrey liable for breach of contract, setting damages in the amount of \$41,602.40; invasion of privacy, with damages of \$10,000; and concealment, with damages of \$10,000. The jury also awarded Hasso-Najm \$35,000 in punitive damages. The trial court denied Ferrey's request for a new trial and entered judgment against her.

## DISCUSSION

Ferrey's contention on appeal is a narrow one. She argues that "the jury verdict on the intentional concealment cause of action must be reversed as there was insufficient evidence presented at trial that [Hasso-Najm] was reasonable to rely upon [Ferrey's] statement that there were only two prior attorneys involved in her marital dissolution matter when [Hasso-Najm] entered into the retainer agreement."<sup>1</sup> As a consequence,

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<sup>1</sup> Hasso-Najm emphasizes in her brief that the concealment claim was broader than simply the misrepresentation about the number of previous attorneys. Indeed, Ferrey's own brief recognizes that Hasso-Najm "asked the jury to award her damages for intentional concealment based upon [Ferrey's] failure to disclose all of the information regarding the pending dissolution matter and the number of attorneys whom [*sic*] had previously represented [her]." As we conclude that Ferrey's argument for reversal, even with respect to a narrow interpretation of the concealment claim, is without merit, we

Ferrey contends, "the jury's verdict on the concealment claim must be reversed." Ferrey expressly "does not challenge the jury's finding that [she] was not forthright with [Hasso-Najm] during the client intake" and does not take issue with any other aspect of the proceedings in the trial court.

"Concealment is a species of fraud or deceit." (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 868.) To establish a claim of concealment, as with fraud claims generally, a plaintiff must show "'justifiable" reliance, i.e., circumstances were such to make it *reasonable* for [the] plaintiff to accept [the] defendant's statements without an independent inquiry or investigation.'" (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 864 (*OCM Principal*); *Seeger v. Odell* (1941) 18 Cal.2d 409, 414 (*Seegar*) ["It must appear . . . not only that the plaintiff acted in reliance on the misrepresentation but that he was justified in his reliance."].) "The reasonableness of the plaintiff's reliance is judged by reference to the plaintiff's knowledge and experience." (*OCM Principal*, at p. 864.) "'If the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable, . . . he will be denied a recovery.'" (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240 (*Alliance Mortgage*).)

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need not attempt to discern whether the jury might have taken a broader view of the concealment claim (and thus whether the evidence would alternatively have supported the verdict under that broader view).

"Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact . . ." committed to the jury. (*Alliance Mortgage, supra*, 10 Cal.4th at p. 1239; *Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 503 ["Whether reliance is justified is a question of fact . . ."].) A jury finding on this question can be reversed on appeal only "if reasonable minds can come to only one conclusion based on the facts." (*Alliance Mortgage*, at p. 1239.) In addition, as with any substantial evidence challenge, we must "'view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor . . .'" (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.)

Given this legal backdrop, Ferrey acknowledges she has a difficult task to obtain reversal of the jury verdict. As our colleagues in the Second District have explained in rejecting an analogous claim, a plaintiff will be denied recovery on the ground that his reliance on a fraudulent assertion or omission was not justifiable "'only if his conduct is manifestly unreasonable in the light of his own intelligence or information. It must appear that he put faith in representations that were 'preposterous' or 'shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth.' '" (*OCM Principal, supra*, 157 Cal.App.4th at p. 865.)

Our review of the record demonstrates that Ferrey cannot carry this burden. The record simply does not support a conclusion that Hasso-Najm's reliance on Ferrey's representations was ""preposterous,"" or that those representations, in light of the facts

known to Hasso-Najm, were ""patently and obviously false."" (OCM Principal, supra, 157 Cal.App.4th at p. 865.)

Support for the jury's finding comes largely from Hasso-Najm's testimony at trial, which we must credit given the procedural posture of the case.<sup>2</sup> (See *People v. Scott* (1978) 21 Cal.3d 284, 296 [recognizing that credibility determinations are committed to the jury and thus even "[t]he uncorroborated testimony of a single witness is sufficient to sustain a [jury verdict], unless the testimony is physically impossible or inherently improbable."].) Hasso-Najm explained that she took the case without independently investigating the circumstances (beyond her review of the trial brief) for the following reasons: (1) the looming trial date required prompt action; (2) she had already expended significant time on the case and did not want to devote further resources to it without being retained; and (3) she felt a personal connection with Ferrey as a victim in distress. With respect to this last point, Hasso-Najm explained that Ferrey came into the office crying and saying she was a victim not only of her ex-husband but also of her attorney (Doppelt). "[S]omething inside [Hasso-Najm] said, 'I have to help her. . . . This is why I became an attorney, and I'm going to help this woman, even if it's going to take a personal sacrifice on my part, where I'm going to have to work like a dog for the next two weeks to get ready for this trial . . . .'" In weighing this explanation, the jury concluded that Hasso-Najm's reliance on Ferry's representations (in addition to the trial brief) was

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<sup>2</sup> In her own testimony, Ferrey disputed much of Hasso-Najm's trial testimony.

justifiable.<sup>3</sup> While reasonable people might differ on this question, we cannot conclude that the jury's finding is so lacking in rationality that it meets the standard for reversal on appeal.

We recognize that Ferrey's acknowledging having had two prior attorneys on the case and her desire to substitute attorneys so close to the date of trial constituted "red flags," and that Hasso-Najm could have determined the true nature of the dissolution proceedings through an independent review of the court file. Nevertheless, "[n]egligence on the part of the plaintiff in failing to discover the falsity of a statement is no defense when the misrepresentation was intentional rather than negligent." (*Alliance Mortgage, supra*, 10 Cal.4th at pp. 1239-1240.) "The fact that an investigation would have revealed the falsity of the misrepresentation will not alone bar . . . recovery," and "it is well established that [the plaintiff] is not held to constructive notice of a public record which would reveal the true facts." (*Seeger, supra*, 18 Cal.2d at pp. 414-415; *Manderville v. PCG&S Group, Inc.* (2007) 146 Cal.App.4th 1486, 1503 [same].)<sup>4</sup>

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<sup>3</sup> With respect to the concealment cause of action, the jury finding in the instant case (as reflected on the special verdict form) was that Ferrey: (i) "intentionally fail[ed] to disclose an important fact that Jennifer Hasso[-Najm] did not know and could not reasonably have discovered"; (ii) Ferrey "intend[ed] to deceive Jennifer Hasso[-Najm] by concealing the fact" and Hasso-Najm "rel[ied] on Donna Ferrey's deception" and the "reliance [was] reasonable under the circumstances."

<sup>4</sup> Ferrey relies on two cases: *Carroll v. Dungey* (1963) 223 Cal.App.2d 247 and *Hobart v. Hobart Estate Co.* (1945) 26 Cal.2d 412. Both cases concern plaintiffs who conducted independent investigations into the defendants' misrepresentations and are thus distinguishable. In addition, to the extent the cases can be deemed relevant despite this obvious distinction, they rebut rather than support Ferrey's argument. In *Hobart*, the court ultimately rejected the contention that the fact of an investigation precluded

In sum, in light of the record evidence described above, we cannot conclude, with respect to whether Hasso-Najm's reliance was justifiable, that this is the "'rare case where the undisputed facts leave no room for a reasonable difference of opinion.'" (*Alliance Mortgage, supra*, 10 Cal.4th at pp. 1239-1240.) At most, reasonable minds could differ as to whether Hasso-Najm's reliance was justifiable and, consequently, we cannot disturb the jury's verdict. (*Ibid.*)<sup>5</sup>

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recovery, stating: "A defrauded person . . . is not barred from maintaining an action merely because he commenced an investigation if it was incomplete or abandoned before discovery of the falsity . . . ." (*Hobart*, at p. 435.) In *Carroll*, our colleagues in the Third District similarly held that the plaintiff's investigation did not bar recovery because the record did not demonstrate that the investigation revealed the true facts. (*Carroll*, at pp. 256-257 [stating "'general rule'" that "'negligence of the plaintiff is no defense to an intentional tort,'" and thus the "'fact that an investigation would have revealed the falsity of the misrepresentation will not alone bar his recovery'"].)

<sup>5</sup> Hasso-Najm requests that "if the judgment is affirmed, the Court should add that [she] is entitled to attorneys' fees incurred on appeal, and the matter should be remanded to the superior court for a determination of the reasonable amount of [her] fees and costs." She also notes that she has appealed the trial court's ruling as to attorney fees in a separate appeal. We decline to take any action with respect to attorney fees at this juncture. The determination of the propriety of a fee award and its amount is "best decided by the trial court in the first instance" and the trial court's ruling, if any, on attorney fees is not currently before us. (*Nestande v. Watson* (2003) 111 Cal.App.4th 232, 238.)

DISPOSITION

Affirmed.

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IRION, J.

WE CONCUR:

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MCDONALD, Acting P. J.

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O'ROURKE, J.